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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1162

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS JOSEPH WILSON AND BOBBY ANTONIO BRYAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-24) is reported at 488 F. 2d 1231.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25) was entered on November 28, 1973. On December 20, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including January 28, 1974, and the petition was filed on that date. It was granted on May 13, 1974 (App. 36). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the holding of *Harris* v. *United States*, 382 U.S. 162 (involving the refusal of a witness to answer questions before a grand jury), precludes the use of summary criminal contempt proceedings under Rule 42(a) of the Federal Rules of Criminal Procedure when a witness, in disobedience of a court order, refuses to testify at a criminal trial after receiving a grant of immunity.

2. Whether, if the principles of *Harris* are found to govern the instant case, that decision should be overruled.

STATUTE AND RULE INVOLVED

18 U.S.C. 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42 of the Federal Rules of Criminal Procedure provides:

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Pursuant to indictments returned in the United States District Court for the Southern District of New York, respondent Wilson and one Robert Anderson were charged with armed robbery of the federally insured Empire National Bank in Tuxedo, New York. Anderson was also charged with robbery of the Nanuet National Bank in Mount Ivy, New York. A separate indictment charged respondent Bryan with the Nanuet National Bank robbery. Wilson and Bryan both pleaded guilty to charges in connection with the robberies.

Thereafter, Robert Anderson's trial began, and the government called both Wilson and Bryan as witnesses. At that time Bryan had been sentenced provisionally to twenty-five years' imprisonment pursuant to 18 U.S.C. 4208(b). Wilson had not yet been sentenced.[1]

Respondents were sworn as witnesses in the Anderson trial. However, both refused to answer any questions concerning their acquaintance with Anderson or the details of the robberies, predicating their refusals on the privilege against self-incrimination. The reason advanced on behalf of each respondent for claiming the privilege was fear that any testimony would adversely affect final disposition of his own case by informing the sentencing judge of the details of the crimes.[2]

The district court sought to remove this objection as to Wilson by sentencing him immediately. Sentencing was deferred, however, when the court discovered that information in the pre-sentence report had not been verified and that Wilson wished to have the court consider a psychologist's report (App. 6–14).

The court then conferred immunity on respondents pursuant to 18 U.S.C. 6002–6003, ordered them to

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[1] Subsequently, Bryan's sentence was reduced to ten years. Wilson was committed for an indefinite term pursuant to the Youth Corrections Act, 18 U.S.C. 5010(b).

[2] The record indicates, and the court of appeals noted, that respondents' motives may have been otherwise. In the case of respondent Wilson, the refusal was plainly based on loyalty to Anderson (App. 14, 19). The privilege against self-incrimination is, of course, entirely personal and may not be invoked to protect another. See *Rogers* v. *United States*, 340 U.S. 367; *United States* v. *Seavers*, 472 F. 2d 607, 611 (C.A. 6).

testify, and warned them that continued refusal would result in punishment for contempt.[3] When respondents persisted in their refusals to testify, both were summarily held in contempt.

Prior to imposing sentence, the court heard from respondents' counsel [4] and in addition offered respondents an opportunity to make a statement concerning the sentence to be imposed. Respondents indicated that they had nothing to say (App. 20, 34) and the court imposed sentences of six months' imprisonment, to be served consecutively to the sentences on the robbery charges. Execution of the sentences was stayed pending appeal.[5]

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[3] The court's statement to Wilson, which was substantially identical to the explanation given Bryan, was as follows:

"Mr. Wilson, you have no right to refuse to answer on the grounds that it may incriminate you because I have just told you I have conferred immunity on you which means you cannot be incriminated by answering unless you give a false answer.

"You can nevertheless refuse to answer if you wish, but if you do, I would have to hold you in contempt of Court and you would be subject to a penalty of imprisonment or a fine" (App. 18).

We point out that the word "not" appearing on the second to the last line on App. 11 is a typographical error. The word should read "now."

[4] Since Bryan's counsel was unavailable, he was represented by Wilson's counsel, who had determined that there was no conflict in representing both respondents (App. 22–23). Although respondents' counsel objected to the government's calling of respondents as witnesses, she did not object to the employment of summary contempt procedures.

[5] The sentences were expressly made provisional, with the judge indicating that he would consider a reduction after completion of appellate proceedings on the cases (App. 18–20, 33–34).

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The court of appeals found that the grants of immunity were dispositive of respondents' privilege claims and that neither respondent followed the "proper procedure in raising the issue of 'forbidden use'" (Pet. App. 21).[6] The court of appeals nevertheless reversed respondents' contempt convictions, holding that the summary procedures of Rule 42(a) are inapplicable to orderly refusals to testify, even when such refusals occur in the course of a trial. Relying on its prior decision in *United States* v. *Marra*, 482 F. 2d 1196, and this Court's decision in *Harris* v. *United States, supra*, 382 U.S. 162, the court of appeals stated that "the bare 'opportunity to be heard'" which was accorded respondents was insufficient because, if permitted a reasonable time, respondents' counsel "might have marshalled and presented facts in mitigation of the charge" (Pet. App. 23). Accordingly, respondents' convictions were reversed and the case was remanded for further proceedings pursuant to the notice and hearing provisions of Rule 42(b).

SUMMARY OF ARGUMENT

The issue presented by this case is whether a witness who refuses to testify, following a grant of immunity coextensive with the privilege against self-incrimination, may be punished for criminal contempt in summary proceedings under Rule 42(a) of the Federal Rules of Criminal Procedure. The court of

[6] The court of appeals outlined what would have been the proper procedure: Wilson could have requested that he be sentenced by a different judge, and Bryan could have sought to have the record of his testimony sealed.

appeals held that such conduct could be punished only upon notice and hearing as provided by Rule 42(b). In so holding, the court of appeals misinterpreted this Court's opinion in *Harris* v. *United States, supra,* 382 U.S. 162, and imposed an unwarranted restriction on the summary contempt power of trial courts that could interfere with the procurement of needed testimony in criminal trials.

In *Harris* this Court held that summary contempt could not be employed to punish a recalcitrant grand jury witness whose refusal to testify was subsequently reenacted before the court. The decision in *Harris* was based on two factors: first, the contumacious conduct was not originally committed in the presence of the court; second, the delay required for notice and hearing under Rule 42(b) would not have significantly affected the operation of the grand jury which sought the testimony.

Although in the present case the contempt was committed in the presence of the court and the delay could have resulted in a substantial disruption of the pending trial, the court of appeals nonetheless relied on *Harris* in holding summary contempt unavailable. The court interpreted *Harris* as limiting the availability of summary contempt to the quelling of disturbances or the punishment of other insolent conduct.

The court of appeals' decision constitutes an unjustified extension of *Harris.* Testimonial refusal in the presence of the court is punishable as criminal contempt under 18 U.S.C. 401(3). The district court properly employed the summary procedures of Rule 42(a), since the contumacious conduct occurred in its

presence after respondents had clear notice that continued refusal would result in contempt. Since the principal purpose of a Rule 42(b) hearing is to establish the facts surrounding the alleged contempt, and since in this case those facts had been directly observed by the district court, there was no reason to resort to the notice and hearing procedures of Rule 42(b). Moreover, utilization of summary civil contempt procedures would have been ineffective, since respondents were already incarcerated, and since the trial in which their testimony was required was to be of short duration.

ARGUMENT

I. REFUSAL TO TESTIFY AT TRIAL IS PUNISHABLE AS CONTEMPT UNDER 18 U.S.C. 401

18 U.S.C. 401 provides, in relevant part, that a federal court shall have power to punish by fine or imprisonment, "such contempt of its authority" as "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." Testimonial refusal at trial in disobedience to a court order is clearly punishable as contempt.

The right to summon witnesses and compel testimony has long been recognized as a necessary incident of judicial power. The power to punish for contumacious refusals to testify is particularly necessary in criminal proceedings[7] and is but a corollary of the well established principle that "the public has a right to every man's evidence." 8 Wigmore, *Evidence*, § 2192, p. 70,

[7] The contempt power is not restricted to disobedience of court orders in criminal proceedings. See, *e.g.*, *Hickman* v. *Taylor*, 329 U.S. 495.

(McNaughton rev. 1961). It may be valuable not only to the prosecution but to defendants who wish to compel testimony which is expected to be exculpatory.

This power was recognized by English common law and carried over to the colonies, where it was established both as a principle of common law and as a power conferred by statute. See Fox, *The Summary Process to Punish Contempt*, 25 L.Q. Rev. 238 (1909); *United States* v. *Barnett*, 376 U.S. 681, 701–724 (Appendix to Opinion of the Court). Both colonial and early state legislation reaffirmed that failure to appear when summoned as a witness or failure to testify was punishable as contempt. See the Appendix to the Brief of the United States in *Harris* v. *United States*, 382 U.S. 162 (No. 6, October Term, 1965).

American courts have always recognized that refusal to testify may constitute criminal contempt. See, *e.g.*, *Whittem* v. *The State*, 36 Ind. 196, 212; *The People, ex rel. Hackley* v. *Kelly*, 24 N.Y. 74, 80. As this Court observed in *Ex parte Hudgings*, 249 U.S. 378, 382: "That the contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt is so well settled as to need only statement."

Thus, refusal to testify is conduct punishable as contempt under 18 U.S.C. 401(3), and, as we shall now show, the district court properly employed the summary procedures of Rule 42(a) of the Federal Rules of Criminal Procedure.

II. THE DISTRICT COURT PROPERLY EMPLOYED THE SUMMARY PROCEDURES OF RULE 42(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 42(a) of the Federal Rules of Criminal Procedure provides that a criminal contempt "may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." All other criminal contempts must be prosecuted upon notice pursuant to Rule 42(b). These provisions reflect the common law rule and the prevailing practice in this country. *Bloom* v. *Illinois*, 391 U.S. 194, 209; *Baker* v. *Eisenstadt*, *supra*, 456 F. 2d 382 (C.A. 1), certiorari denied, 409 U.S. 846.

The decision of the court of appeals is squarely in conflict with the plain and unambiguous language of Rule 42(a). Rule 42(a) expressly provides that summary procedures may be employed to punish contempts occurring in the "actual presence of the court." While it was arguable in *Harris*, *supra*, that the contempt there involved did not occur in the "actual presence of the court," there can be no such suggestion in the present case. Thus, unlike *Harris*, the court of appeals' decision in this case cannot be founded on a construction of the language of Rule 42(a); rather, the decision is necessarily based on an unarticulated assumption that constitutional considerations require use of notice and hearing procedures even where the contempt occurs in the "actual presence of the court." This assumption has no basis in either logic or precedent.

1. THE HISTORY OF THE SUMMARY CONTEMPT POWER

The summary power to punish contempts of court is rooted in the oldest principles of Anglo-American jurisprudence.

> The power, which the Courts * * * have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it.

The King v. *Almon*, 97 Eng. Rep. 94, 99 (citation omitted). Acts of contempt committed in the presence of the court have been punishable by summary process in England at least since the fourteenth century.[8] Fox, *The Summary Process to Punish Contempt*, *supra*, 25 L. Q. Rev. at 252, 365.

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[8] Summary punishment was used even when the contemnor was not immediately apprehended. A writ of attachment issued at the discretion of a judge of any court of record for a contempt committed in the face of the court. The writ might be based upon facts within the judge's own knowledge, without indictment or information. When the contemnor was then brought before the court, summary procedure was employed:

"[F]or * * * this summary method of proceeding being absolutely necessary to the furtherance and execution of justice, seems to have been long practised and is certainly now established as part of the law of the land.

* * * * *

"[B]ut we apprehend it must be for a contempt in the face of the court * * * and, if for a contempt in the face of the court, the commitment is by rule of the court, not on process, unless the party escape out of court before he is secured."

Fox, *The Summary Process to Punish Contempt*, *supra*, 25 L. Q. Rev. at 251, quoting Jacob's Law Dictionary (9th ed., Ruffhead & Morgan, 1772).

The power to impose summary punishment was available not only with respect to conduct manifesting outright disrespect for the court or its judges, but also for resistance of the court's process and for disobedience, in the court's presence, of a direct order of the court. *The King* v. *Almon, supra,* 97 Eng. Rep. at 99, 104.[9] The concept of contempt embraced "[a]ny act which interferes with the operation of the court itself, while engaged in the trial of cases, or which renders the court less able properly and with dignity to try cases." Beale, *Contempt of Court, Criminal and Civil,* 21 Harv. L. Rev. 161, 162 (1908). By the eighteenth century, the mode of punishment depended upon whether the contempt had been committed in the face of the court or out of the court's presence. Direct contempts were punished by immediate commitment, while for indirect contempts the contemnor was summoned before the court by writ of attachment. Fox, *The Summary Process to Punish Contempt, supra,* 25 L. Q. Rev. at 367.

The concept of summary process for direct contempts is equally firmly rooted in the jurisprudence of the United States. It is clear that, for contempts *in facie,* punishment can be imposed immediately, without formal notice, plea, or trial, since the presiding

[9] Originally the jurisdiction of the common law courts summarily to punish disobedience to lawful process was founded upon their authority to punish disobedience to the King's writ. Fox, *The King* v. *Almon,* 24 L. Q. Rev. 184, 276–277 (1908). Contumacious treatment of process "is a contempt of the king's command, and * * * disobedience to the king's command was always punished by summary process." Fox, *The Summary Process to Punish Contempt, supra,* 25 L. Q. Rev. at 249.

judge has personal knowledge of the facts of the contumacy. See, *e.g.*, *Fisher* v. *Pace*, 336 U.S. 155, 159–160; *Whittem* v. *The State*, *supra*, 36 Ind. at 211–212; *Cartwright's Case*, 114 Mass. 230, 238; *The People, ex rel. Hackley* v. *Kelly*, *supra*, 24 N.Y. at 80; Beale, *Contempt of Court, Criminal and Civil*, *supra*, 21 Harv. L. Rev. at 172.

2. THE POLICIES UNDERLYING THE SUMMARY CONTEMPT POWER ARE APPLICABLE TO THIS CASE

The primary distinction between contempts that may be prosecuted summarily and those that require notice and a separate hearing is based upon the place and the circumstances in which the contumacy occurs. Rule 42(a) is applied only where the presiding judge is a witness to the occurrence. "If he must depend upon the testimony of other witnesses or the confession of the contemnor for his knowledge of the offense, Rule 42(a) does not apply." *United States* v. *Marshall*, 451 F. 2d 372, 374 (C.A. 9). The purpose of a Rule 42(b) hearing "is to inform the court of events not within its own knowledge." *Sacher* v. *United States*, 343 U.S. 1, 9; see also *Carlson* v. *United States*, 209 F. 2d 209 (C.A. 1).[10]

Additionally, since the summary power is intended to be used where immediate action is required to vindicate the dignity and authority of the court, it must be employed at the time of contempt. See *Taylor* v.

[10] Thus, it has been held that a contumacious letter addressed to the judge or a failure to appear for a scheduled hearing does not take place in the actual presence of the court and does not justify the use of the summary power. *Cooke* v. *United States*, 267 U.S. 517; *United States* v. *Willett*, 432 F. 2d 202 (C.A. 4).

Hayes, No. 73–473, decided June 26, 1974, slip op. at 9–10; *Codispoti* v. *Pennsylvania*, No. 73–5615, decided June 26, 1974, slip op. at 9. Accordingly, a state legislature was precluded from summarily punishing a contemnor who had disrupted its proceedings two days earlier, when no action had been taken at the actual time of the contempt. *Groppi* v. *Leslie*, 404 U.S. 496.[11]

In the present case the refusals to testify occurred in the presence of the court after the court had granted respondents immunity and informed them that continued refusal to testify would result in a finding of contempt. In addition, respondents had an opportunity to offer an explanation for their conduct. Here, unlike the situation which this Court disapproved in *Groppi* v. *Leslie*, *supra*, 404 U.S. at 504:

> [T]he contemnor is present * * *. There is then no question of identity, nor is hearing in a formal sense necessary because the judge has personally seen the offense and is acting on the basis of his own observations. Moreover, * * * the contemnor has * * * been given an opportunity to speak in his own behalf in the nature of a right of allocution.

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[11] This Court's recent decisions in *Taylor* v. *Hayes*, *supra*, and *Codispoti* v. *Pennsylvania*, *supra*, have no bearing on the propriety of the use of summary process in the instant case. Both concerned situations in which contemnors were punished summarily *after* a trial for contempts committed during the trial. The Court held that the right to a plenary hearing exists in a postponed contempt adjudication where there is no need for instant action, but distinguished situations where the contempt is adjudicated summarily because of a need immediately to vindicate the court's authority. *Taylor* v. *Hayes*, *supra*, slip op. at 9–10; *Codispoti* v. *Pennsylvania*, *supra*, slip op. at 7–9.

There was simply no reason to resort to the notice and hearing procedures of Rule 42(b) in this case.[12] On the contrary, there were good reasons for utilizing the summary procedures of Rule 42(a). Not only did such a course provide immediate vindication of the authority of the court, whose direct order had just been flouted, but it provided the best chance of overcoming the witnesses' recalcitrance. While the primary purpose of criminal contempt is punitive and the contemnor cannot automatically obtain his release by compliance with the court's order (*e.g., United States* v. *United Mine Workers,* 330 U.S. 258; *Baker* v. *Eisenstadt,* 456 F. 2d 382 (C.A. 1), certiorari denied, 409 U.S. 846), the penalty imposed for the contempt frequently is, as here, made provisional; the witness therefore knows that a change of heart may lead to reduction or even elimination of the penalty and may accordingly be motivated to provide the needed testimony. Indeed, in the context of a criminal trial, it is this swift sanction for criminal contempt that is more likely to be effective in coercing obedience to the court's orders than the traditional coercive sanction of civil contempt. In this case, for example, while respondents could have been summarily sentenced for civil contempt, such a proce-

[12] There is no doubt that a peaceable refusal to testify, no less than violent or disrespectful behavior, may be punished as a criminal contempt of court. See *Yates* v. *United States,* 355 U.S. 66, 72; *Ex parte Hudgings, supra,* 249 U.S. at 382. When this act of recalcitrance takes place in the presence of the court and obstructs the administration of a trial, it is entirely appropriate to employ the summary powers which are generally applicable to such contempts.

dure would have been futile since respondents were already incarcerated.[13]

Although the facts constituting the contempt were within the personal knowledge of the trial court, the court of appeals nevertheless held summary procedures inapplicable because their use may have precluded respondents from presenting matters in mitigation of their contempts. In our view this consideration was erroneously invoked and is wholly inadequate to justify disregard of the plain language of Rule 42(a).

Respondents were afforded an opportunity to be heard prior to sentencing, and neither respondents nor their counsel suggested any valid defense to the contempt charges. As noted earlier, the court of appeals correctly held that the grants of immunity were dispositive of respondents' privilege claims; therefore, no purpose would have been served by a further hearing on this issue.[14] Finally, the court of appeals' reference to the possibility of a psychiatric defense in Wilson's case, aside from being wholly speculative, reflects a mis-

[13] Even when a recalcitrant witness in a criminal trial is not already incarcerated, the civil contempt sanction is unlikely to provide a substantial incentive to obey the court's order, since a criminal trial, unlike a grand jury, is ordinarily of relatively short duration.

[14] We note that, in our view, entirely apart from the grants of immunity, the privilege against self-incrimination was not available to respondents since they had already pleaded guilty to charges in connection with the robberies. The privilege protects against compulsion to give testimony that could lead to conviction, and accordingly conviction terminates the privilege because there can be no longer a "tend[ency] to incriminate." 8 Wigmore, *Evidence* § 2279, p. 481 (McNaughton rev. 1961). See *Reina* v.

(Continued)

understanding of the record.[15] The logical outgrowth of the court of appeals' line of reasoning would be that summary contempt procedures may *never* be used, since there is always the theoretical possibility that a defense could be developed for presentation at a delayed hearing that does not occur to the contemnor's lawyer at the time, even if the contempt takes the form of violent or disrespectful conduct (this is obviously so with respect to a possible insanity defense).

Respondents were not precluded from offering matters in mitigation; indeed, they could have done so subsequent to being sentenced. As this Court observed in *Groppi* v. *Leslie, supra,* 404 U.S. at 506, n. 11, "[m]odification of contempt penalties is common where the contemnor apologizes or presents matters in mitigation." In this case, moreover, Judge Lasker expressly made the sentences imposed provisional (see note 5, *supra*).

(Continued)
United States, 364 U.S. 507; *United States* v. *Romero*, 249 F. 2d 371 (C.A. 2).

Moreover, we note that it is unlikely that respondents' testimony would have had any bearing on sentencing. Their participation in the robberies was known as a result of their guilty pleas and their testimony was sought for information as to Anderson's participation in the robberies.

[15] Wilson's psychological problems were called to the court's attention in connection with sentencing in the context of a request that he be given probation with the understanding that he seek counseling (App. 12–13). Wilson had been examined by a court-appointed doctor to determine his competency to stand trial (App. 11), and competency was not an issue at the time of his refusal to testify. There is not the slightest suggestion that Wilson was unaware of the nature and consequences of his refusal to testify or that a mental disorder prevented him from complying with the court's order.

This Court has cautioned that the obligation to testify admits of few exceptions. See, *e.g., United States* v. *Calandra,* No. 72–734, decided January 8, 1974. There is no reason to require the delay involved in the notice and hearing procedures of Rule 42(b) merely on the possibility that matters in mitigation or defense might be developed. In the unlikely event that such matters are discovered or developed after sentencing, relief may be sought by a motion for modification or vacation of the adjudication. The summary procedures of Rule 42(a) thus provide adequate protection for defendants without sacrificing the need for prompt action to prevent undue disruption of ongoing proceedings.

III. THE COURT BELOW ERRED IN APPLYING THE RULE OF *HARRIS* V. *UNITED STATES* TO THE FACTS OF THE INSTANT CASE

A. In *Harris* v. *United States, supra,* 382 U.S. 162, the petitioner claimed his Fifth Amendment privilege against self-incrimination in declining to answer questions posed by a grand jury, notwithstanding that he had been ordered by the district court to answer following a grant of statutory immunity. He was then brought before the court and asked the same questions by the judge. Upon his continued refusal to answer, Harris was held in criminal contempt of court and sentenced summarily, pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure.

In concluding that the district court had acted improperly in utilizing the summary procedure of Rule 42(a) rather than holding the full, separate hearing prescribed by Rule 42(b), the majority of this Court

rested its decision on the fact that the initial act of contempt—the refusal to answer immediately after being ordered by the court to do so—took place in the grand jury room, outside the presence of the district judge. On this basis, the Court held that a repetition of the contumacy in open court, in an essentially staged proceeding having no independent purpose, did not constitute an independent contempt. Since the actual contempt was committed out of the presence of the judge, Rule 42(a) was deemed inapplicable. 382 U.S. at 164–165.

Leaving open the possibility that Rule 42(a) might be applied to "testimonial episodes" in other circumstances, the Court emphasized the fact that the notice and hearing procedures of Rule 42(b) would not have imperiled or significantly delayed the grand jury proceedings (*id.* at 164), and thus the Court found no indication "that petitioner's refusal was such an open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures, was necessary" (*id.* at 165; citation omitted).

Harris represented a departure from the then-existing law (as delineated in *Brown* v. *United States*, 359 U.S. 41, overruled by *Harris*), only insofar as it ruled that a contempt that is initially committed outside the presence of the court does not become a direct contempt when repeated in the presence of the judge. *Harris* recognized the traditional distinction between direct and indirect contempts—that, in the case of direct contempt, the judge is present and is consequently aware of all the facts of the contumacy; thus, a further hearing is unnecessary. The essential reason that Rule 42(a) was deemed inapplicable in *Harris*

was a recognition of the long-standing rule that, for summary punishment to be available, justice requires that the sentencing judge have personal knowledge of all the facts of the contempt. See 382 U.S. at 166–167.

Notwithstanding that the requisite factors justifying summary contempt, which this Court found to be absent in *Harris,* were present here, the court of appeals relied on *Harris* in requiring resort to the notice and hearing procedures of Rule 42(b). The court of appeals' decision in this case is not an isolated example of misapplication of *Harris*; rather, it is the most recent of three decisions of the Second Circuit extending *Harris* to recalcitrance occurring in the actual presence of the court during the course of a trial.

In *United States* v. *Pace,* 371 F. 2d 810 (C.A. 2), the court of appeals acknowledged that the "narrow holding of *Harris*" is

> merely that a district judge may not create a summary disposition case by calling a recalcitrant Grand Jury witness before him to reenact his contempt "in the actual presence of the Court." *Id.* at 811.

Seizing upon the language in *Harris* that Rule 42 (a) was reserved for "exceptional circumstances," however, the court of appeals concluded (*ibid.*):

> Summary disposition is thus available only when immediate punishment is necessary to put an end to acts disrupting the proceedings, such as threats to the judge, disturbances in the courtroom or insolence before the court.

The court ruled that the summary power could not properly be applied to a criminal contempt consisting

of an "orderly refusal in the absence of the jury to answer a question on Fifth Amendment grounds before the taking of any testimony." *United States* v. *Pace, supra,* 371 F. 2d at 811.

The rule of *Pace* was subsequently applied in *United States* v. *Marra, supra,* 482 F. 2d 1196 (C.A. 2), on facts nearly identical to those of the instant case.[16] There, the witness' recalcitrance was based upon a claim of Fifth Amendment privilege after a grant of immunity from prosecution, and the contempt obstructed an ongoing trial. The court of appeals' panel commended the efforts of the judge in *Marra* to safeguard the interests of the witness and intimated that, were it not bound by the precedent of *Pace,* the panel would have been inclined to approve the summary procedure employed by the district court in *Marra* (*id.* at 1200). Under the rule of *Pace,* however, the court found that the trial court was not sufficiently "embarrassed" by the contempt to be warranted in the application of Rule 42(a) (*id.* at 1201). Intimating that Rule 42(a) is applicable only to those criminal contempts defined by subsection 1 of 18 U.S.C. 401 ("misbehavior") and not those defined by subsection 3 ("disobedience to court order"), the court suggested that in the case of a testimonial contempt the court might commit the contemnor instantly for civil contempt, pursuant to 28 U.S.C. 1826, while scheduling for a later date a plenary hearing on criminal contempt charges, pursuant to Rule 42(b). *Id.* at 1201.

[16] In *Marra* the contempt occurred in the presence of the jury. In the instant case, the jury was absent from the courtroom when respondents disobeyed the orders to testify.

The court below expressly held *Marra* to be controlling in the instant case.[17] *Marra* and *Pace*, however, reflect a departure from the general rule that criminal contempts committed in the presence of the court may be prosecuted summarily. *E.g., Groppi* v. *Leslie, supra,* 404 U.S. at 504; *Ex parte Terry,* 128 U.S. 289, 307; *Fisher* v. *Pace, supra,* 336 U.S. at 159–160; *In re McConnell,* 370 U.S. 230, 234. The Second Circuit rule, moreover, manifests an inaccurate interpretation of the *Harris* doctrine. The "exceptional circumstances" to which summary disposition is applied under *Harris* include acts "obstructing court proceedings." *Harris* v. *United States, supra,* 382 U.S. at 164.[18] The Court in *Harris* also assumed for the purpose of its opinion that Rule 42(a) may be applied to "testimonial episodes" in appropriate circumstances. *Id.* at 165. Thus, there is nothing in *Harris* to warrant the Second Circuit's blanket denial that Rule 42(a) may be applied in the case of an orderly refusal to testify at trial. And there is persuasive authority for the view that any contempt committed *in facie* "impl[ies] a purpose to destroy or impair [the court's] authority, [or] to obstruct the transaction of its business." *Ex parte Terry, supra,* 128 U.S. at 307.

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[17] The government did not petition for certiorari in *Marra* because of a problem of mootness which is not present here (Marra had completed service of his sentence).

[18] Such obstruction occurred in the instant case. Not only was the Anderson trial interrupted by respondents' contumacy, but Bryan's refusal to testify resulted in the collapse of the prosecution's case against Anderson for the Nanuet bank robbery. (488 F. 2d at 1233; transcript of March 29 and April 2, 1973, pp. 158, 162).

The First Circuit has expressly rejected the interpretation of *Harris* espoused by the court below. In *Baker* v. *Eisenstadt, supra,* 456 F. 2d at 388, the court, on review of a denial of a petition for a writ of habeas corpus arising from a contempt conviction in the state courts, noted that federal Rule 42(a) reflects the common law principle that contempts committed in the presence of the court are punishable summarily. Interpreting this Court's decision in *Groppi* v. *Leslie, supra,* decided subsequent to *Harris,* the First Circuit read as a "categorical" result of *Groppi* that summary proceedings are applicable to *in facie* contempts, including polite refusals to testify, as well as instances of violent or insolent behavior. *Baker* v. *Eisenstadt, supra,* 456 F. 2d at 388.[19]

In extending *Harris* to *in facie* contempts, the Second Circuit has overlooked or misunderstood the important differences between grand jury proceedings and criminal trials. While the life of a grand jury is anywhere from 30 days to 18 months, the normal criminal trial lasts only a few days. Civil contempt may well be ineffective in a trial context, and it is certainly so where, as here, the contemnor is already incarcerated. The delay necessitated by Rule 42(b) procedures would be unlikely seriously to disrupt grand jury proceedings (except where a grand jury is nearing the end of its term), but such delay would have substantial disruptive effects in a trial.

[19] The application of Rule 42(a) to an orderly refusal to testify has also been tacitly approved by the Sixth Circuit in *United States* v. *Scavers, supra,* 472 F. 2d at 611 (C.A. 6), where the issue was not expressly raised.

In short, the use of summary procedures was entirely appropriate in dealing with respondents' testimonial refusal at trial. They were given notice that continued recalcitrance would result in contempt, and a plenary hearing was unnecessary since the conduct was observed by the court and respondents were accorded an opportunity to speak by way of allocution. The requirements of due process were fully satisfied, and, in light of the realities of the trial context, summary contempt was "the least possible power adequate to the end proposed." *Anderson* v. *Dunn*, 6 Wheat. 204, 231.

B. Since the principal factors underlying this Court's decision in *Harris*—the commission of the contempt outside the presence of the court and the absence of a significant possibility of disruption from the use of notice and hearing procedures—are not present in the case of testimonial recalcitrance at trial, we submit that *Harris* simply has no application to this case. If, however, despite our submission, this Court deems *Harris* applicable here, we submit that the policies underlying the summary contempt power require that *Harris* be reconsidered and overruled. We need not repeat here the arguments concerning the merits of the issue presented in *Harris*, which have been made above and in the government's briefs in *Harris* (No. 6, October Term, 1965) and *Brown* v. *United States*, *supra*, 359 U.S. 41 (No. 4, October Term, 1958). We note only that the continuing vitality of *Harris* may be considered to be in some doubt as a result of the approving citation of *Brown* in *Groppi* v. *Leslie*, *supra*, 404 U.S. at 504–505, and *United States* v.

Calandra, supra, No. 72–734, decided January 8, 1974 (slip op. at 7, n. 4).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the judgments of the district court reinstated.

Respectfully submitted.

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